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IN THE

Supreme Court of the United States

OCTOBER TERM, 1960

No. 484

WESTINGHOUSE BROADCASTING COMPANY, INC.,

Appellant,

vs.

UNITED STATES OF AMERICA, RADIO CORPORATION OF AMERICA and NATIONAL BROADCASTING COMPANY, INC.,

Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA

JURISDICTIONAL STATEMENT

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ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA

JURISDICTIONAL STATEMENT

OPINION BELOW

Westinghouse Broadcasting Company, Inc. (Westinghouse) appeals from a decision of the United States District

Court for the Eastern District of Pennsylvania, filed Ju
27, 1960, denying its motion for leave to intervene. Int
vention was sought to demonstrate that the provisions
the Final Judgment of that Court, entered September
1959, were being violated.* The opinion of the Distr
Court is reported in Trade Regulations Rep., para. 69,7
and 3 Fed. Rules Serv. 2d 24b.61, Case 1, is printed
Appendix A hereto, *infra*, p. A 1, and appears at page
of the Record.

JURISDICTION

On December 4, 1956, the United States commenc
an action against Radio Corporation of America (RC
and National Broadcasting Company, Inc. (NBC) char
ing violation of Section 1 of the Sherman Act (26 St
209, as amended, Title 15 U.S.C., Sec. 1). The compla
(R. 1-9) charged that NBC and RC[redacted] conspired
restrain trade by obtaining television [redacted]ions in five
the eight largest markets in the United States. It furth
alleged that, pursuant to that conspiracy, NBC and RC
had coerced Westinghouse into exchanging its televisi
station in Philadelphia (WPTZ) for NBC's television st
tion in Cleveland by threatening to terminate the NB
affiliation of WPTZ and Westinghouse's Boston stati
and by threatening to withhold NBC affiliation from We
inghouse in Pittsburgh and other markets in which We
inghouse might in the future own stations. That action w
terminated by the entry on September 22, 1959, of the Fi
Judgment which, among other things, required NBC
divest itself of WPTZ, subject to the control of the Cou

*The Final Judgment is reported in Trade Regulations Rep., pa
69,459, is printed in Appendix A hereto at p. A 3, and appea
at page 10 of the Record which has been filed in this Court togeth
with the Jurisdictional Statement.

Being aggrieved by subsequent acts of NBC which it believed violated the Final Judgment, Westinghouse moved on May 9, 1960, to intervene, pursuant to Rules 24(a)(3) and 24(b) of the Federal Rules of Civil Procedure, in order to demonstrate the existence of those violations, after it had been informed by plaintiff, the United States of America, that it would not seek a court determination whether those acts violated the Judgment. Westinghouse's motion was denied on June 27, 1960. The denial of the motion left no further proceeding before the District Court, and Westinghouse and all others whom the decree was designed to protect forever lost the protection provided by the Judgment. Notice of appeal was filed by Westinghouse in the District Court on August 17, 1960.

The jurisdiction of the Supreme Court to entertain this appeal is conferred by Section 2 of the Expediting Act (32 Stat. 823, as amended, 15 U.S.C. Sec. 29).

The following decisions sustain the jurisdiction of the Supreme Court to entertain the appeal:

Sam Fox Publishing Co., Inc. v. *United States*, 362 U. S. 986;

Wometco Television & Theatre Co. v. *United States*, 355 U. S. 40;

Sutphen Estates, Inc. v. *United States*, 342 U. S. 19;

Brotherhood of Railroad Trainmen v. *Baltimore & Ohio R. R.*, 331 U. S. 519;

Allen Calculators, Inc. v. *National Cash Register Co.*, 322 U. S. 137; and

Missouri-Kansas Pipe Line Co. v. *United States*, 312 U. S. 502.

QUESTIONS PRESENTED

1. Since the disposition of WPTZ was under the control of the District Court and the disposition of WPTZ proposed by NBC would adversely affect Westinghouse, did not Westinghouse have the right, under Rule 24(a)(3), to intervene to demonstrate that such disposition would violate the Judgment?

2. Did not the District Court err in holding that it had deprived itself of "jurisdiction to allow the intervention" when it entered the Judgment providing that the parties "and no one else" might apply to the Court for further orders?

3. Did not the District Court abuse its discretion when it held that plaintiff's opposition to intervention by Westinghouse required the Court to refuse to exercise its discretion under Rule 24(b) to permit intervention?

STATEMENT OF FACTS

Westinghouse owns a television station (WBZ-TV) in Boston which has had a network affiliation agreement with NBC since 1949. It also owns television stations in Baltimore, Cleveland, Pittsburgh and San Francisco. In 1954 Westinghouse owned a television station in Philadelphia (WPTZ) which had a network affiliation agreement with NBC.

(a) Exchange of stations between NBC and Westinghouse.

In September 1954, NBC advised Westinghouse that the NBC Board of Directors had decided to own television stations in five of the largest markets and was therefore determined to acquire stations in Philadelphia and Boston or

San Francisco. NBC advised Westinghouse that the NBC affiliation of Westinghouse's Philadelphia station would terminate unless Westinghouse agreed to sell its Philadelphia station to NBC. Westinghouse, therefore, exchanged its Philadelphia station for NBC's station in Cleveland and $3,000,000.

(b) Government's action against RCA and NBC.

In December, 1956, the United States instituted the above-captioned action against RCA and NBC. The complaint alleged that network affiliation was "generally essential to the economic survival of television stations except in the three largest major markets"—New York, Chicago, Los Angeles (R. 4, para. 9). The Government alleged that RCA and NBC were engaged in an unlawful conspiracy to obtain VHF television stations in five of the eight primary markets by the unlawful use of NBC's power to grant or withhold NBC network affiliation (R. 7, paras. 18, 19). The complaint further alleged that RCA and NBC had carried out that conspiracy in part by depriving Westinghouse of its television station in Philadelphia by threatening to refuse to renew NBC affiliation with Westinghouse stations in Boston and Philadelphia, withholding NBC affiliation from the station about to be acquired by Westinghouse in Pittsburgh and threatening to withhold network affiliation from Westinghouse in the future (R. 7, para. 20).

On September 22, 1959, the District Court entered on consent a Final Judgment which enjoined NBC and RCA from coercing or attempting to coerce any person to sell any broadcast station to either defendant by terminating or threatening to terminate, or refusing or threatening to refuse to enter into, an NBC network affiliation agreement with any other television broadcast station controlled by the same person (Section IV(A), p. A6, *infra*). It further enjoined NBC and RCA from acquiring any television

broadcast station in, among other market areas, Boston or San Francisco, except upon prior written notice to the plaintiff. The Government had the right to apply to the District Court for a determination whether the consent of the other party to any proposed acquisition was obtained by acts or conduct of the defendants which constituted either (a) an unreasonable restraint of trade or (b) a violation of the injunction against coercion (Section IV(B), pp. A6-7, *infra*). The Judgment required NBC, on or before December 31, 1962, to dispose of the Philadelphia television and radio stations which it had acquired from Westinghouse. The Government was given, in case the disposition was effected by an exchange, the same right to apply to the District Court for a determination as to the nature of the acts which resulted in the exchange (Section V, pp. A8-9, *infra*).

(c) NBC's attempt to evade the Final Judgment.

Shortly after entry of the Judgment, NBC advised Westinghouse that it intended to exchange the Philadelphia station (which the Judgment required NBC to dispose of) for a station in one of the largest markets in the United States. NBC stated that its first preference was to acquire a television station in Boston; it also expressed interest in Westinghouse's stations in Pittsburgh and San Francisco. Westinghouse recognized that NBC's proposal to acquire a station in Boston threatened Westinghouse with loss of its Boston affiliation with NBC, as had previously been threatened in Philadelphia. Westinghouse sought to protect its Boston station's affiliation with NBC by offering to re-exchange the Cleveland and Philadelphia stations. NBC rejected that suggestion, and Westinghouse expressed its unwillingness to dispose of its Boston, Pittsburgh or San Francisco stations.

Shortly thereafter NBC entered into a "package deal" by which it attained the objectives which the Government had alleged were the purposes of the original illegal conspiracy. In December, 1959, NBC and RKO General, Inc., entered into an "agreement in principle" providing for the exchange of the NBC radio and television stations in Philadelphia (market 4) for the RKO General radio and television stations in Boston (market 6). That exchange was conditioned upon the purchase by RKO General of the NBC radio and television stations in Washington, D. C. (market 11) for $11,500,000. The entire transaction was in turn contingent upon "the simultaneous acquisition by NBC of a television station in a replacement market deemed suitable by NBC". In February, 1960, NBC entered into an agreement to purchase KTVU in San Francisco (market 7) for approximately $7,000,000. That agreement was conditioned upon the sale by NBC of its Washington radio and television station. Thus, all transactions were part of the same bundle.

The consummation of that "package deal" will result in the termination of the Westinghouse NBC affiliation in Boston. Thus, the Philadelphia station, which NBC obtained from Westinghouse in the transaction the Government claimed was unlawful and which the Judgment required NBC to divest, will, upon consummation of the transaction, have been the instrument used by NBC to injure Westinghouse a second time.

(d) Government's failure to enforce the Judgment and Westinghouse's motion to intervene.

On May 6, 1960, counsel for the Government and the defendants appeared before the District Court. The Government advised the Court that "it is more likely that we will not ask for a determination as permitted by the Judgment

than that we will" (R. 32-33). However, the Government, which knew that Westinghouse proposed to move for leave to intervene, stated:

> "Mr. Hollander: I would like to call your attention to Section VIII, which states, 'Jurisdiction is retained for the purpose of enabling any of the parties to this Final Judgment, and no one else, to apply to this Court at any time,' and that is as far as I will go with it. But just to point out to Your Honor that jurisdiction has not been exhausted and that the government not only would not oppose hearing anyone who wishes to be heard on this subject, but would urge you to exercise your discretion, to hear them if there should be any." (R. 39)

On May 9, 1960, Westinghouse, having been advised by the Government that it did not propose to seek a determination by the District Court as to whether the Judgment had been violated, moved for leave to intervene. Westinghouse sought to show that the proposed "package deal" violated the Judgment.

The Government subsequently shifted its position with respect to Westinghouse's intervention. On June 3, 1960, the Department of Justice filed a memorandum (R. 43) urging the Court to "deny movants leave to intervene as parties". It did not assert that any injury to the public or detriment to the enforcement of the antitrust laws would result if Westinghouse were permitted to intervene.

THE QUESTIONS ARE SUBSTANTIAL

This appeal raises substantial and important questions concerning the interpretation of Rule 24(a)(3), the continuing jurisdiction of a district court over its own decree and the enforcement of decrees.

(a) Intervention as of right under 24(a)(3).

The first question presented by this appeal is the right of Westinghouse to intervene pursuant to Rule 24(a)(3) of the Federal Rules of Civil Procedure, which requires the court to permit intervention,

> "when the applicant is so situated as to be adversely affected by a distribution or other disposition of property which is in the custody or subject to the control or disposition of the court . . . ."

The District Court had within its control the disposition of NBC's Philadelphia station (WPTZ), which the Department of Justice alleged had been illegally obtained from Westinghouse. The disposition of that station in exchange for RKO's Boston station will adversely affect Westinghouse by automatically terminating the NBC affiliation of the Westinghouse Boston station. Thus, the very fruit of what the Government alleged was an illegal conspiracy to obtain WPTZ from Westinghouse is being used again to injure Westinghouse.

In *Sutphen Estates, Inc.* v. *United States*, 342 U. S. 19, petitioner was a lessor of theatre properties to a subsidiary of a subsidiary of Warner Bros. Pictures, Inc. The lease was guaranteed by Warner Bros. Under a plan of reorganization pursuant to a decree requiring the separation of Warner Bros. into two independent corporations, one encompassing the production and distribution, and the other the exhibition, portion of the business, the guaranty was to be assumed by the exhibition company only. The Court stated:

> "It is true that this is a case of 'a distribution or other disposition of property which is in the custody or subject to the control or disposition of the court . . .' within the meaning of Rule 24(a)(3)." *Id.* at p. 22

Intervention of right was denied, but only because petitioner was not "adversely affected" by the disposition of the property, there being no showing that the guaranty of the new company was less valuable than Warner's guaranty.

Westinghouse clearly is adversely affected by the proposed transaction. In denying the Westinghouse motion to intervene the District Court disregarded the principles enunciated by the Supreme Court in *Sutphen Estates*.

(b) The Court had not surrendered jurisdiction.

This Court has not passed upon a provision of a judgment reserving the right to the parties "and no one else" to apply to the court for orders with respect to the decree. The District Court held that provision divested it of jurisdiction to entertain a motion by anyone other than the parties. That decision would appear to be contrary to the nature of consent judgments as decrees of the courts, having the same status as litigated decrees. In *United States* v. *Swift & Co.*, 286 U. S. 106, the Supreme Court stated that, even if the decree there in issue had not contained a specific power to modify the decree,

> "power there still would be by force of principles inherent in the jurisdiction of the chancery. A continuing decree of injunction directed to events to come is subject always to adaptations as events may shape the need. . . . The result is all one whether the decree has been entered after litigation or by consent." *Id.* at 114.

If a court has inherent jurisdiction to modify a decree regardless of the terms of the decree, it must retain jurisdiction with respect to the decree for other purposes. One of the general powers it retains is the power to hear applications with respect to enforcement of the decree and the power to permit persons to intervene for that purpose.

The Department of Justice recognized that the District Court retained jurisdiction to permit intervention when it urged that "jurisdiction has not been exhausted" to permit Westinghouse to intervene (R. 39, p. 8, *supra*.). Thus at least one of the consenting parties recognizes that the "and no one else" language was not intended to sterilize the Court's power. The effect of a contrary interpretation would be to nullify Rule 24(a) of the Federal Rules of Civil Procedure which designates situations in which applicants are permitted to intervene as of right.

(c) Plaintiff's position should not have controlled the District Court's discretion.

The antitrust laws are intended, among other things, to protect private individuals who suffer, or would suffer, economic injury by reason of violations. As a result, a private party is permitted to recover treble damages for antitrust violations, Clayton Act, Sec. 4 (38 Stat. 731, 15 U. S. C. Sec. 15). And a private party may use a judgment obtained by the United States in a litigated action as prima facie evidence of violation in bringing such a treble damage action, Clayton Act, Sec. 5 (38 Stat. 731, as amended, 15 U. S. C. Sec. 16). By entering into a consent decree, a defendant avoids the effect of Section 5 of the Clayton Act. Nevertheless, in settling the action, the Government is presumably protecting the interests of the defendant's competitors and others affected. It is consonant with those objectives that parties having such an interest be permitted to intervene to enforce judgments entered upon consent. *Cf. United States* v. *Vehicular Parking, Limited*, 7 F.R.D. 336, 337 (D. Del. 1947).

The issues Westinghouse sought to raise were those available to plaintiff under the Judgment and were therefore common to the issues in the main action, as required by Rule 24(b). The District Court, however, never reached the

question as to whether the public interest or the private interest of Westinghouse would be served by the Court's exercising its discretion to permit Westinghouse to intervene. It held merely that, since plaintiff opposed intervention (which it did after originally acquiescing), the Court would not as a matter of law exercise its discretion to permit intervention.*

In *Allen Calculators, Inc. v. National Cash Register Co.*, 322 U. S. 137, this Court indicated that intervention should be permitted in a case such as this if the Government does not appear to present all the available facts to the court. In that case, however, the denial of intervention was upheld because the United States opposed defendants' proposed acquisition as a violation of the decree there involved and the record in the court below indicated that "the issues were thoroughly explored . . ." (*Id.* at 142). In the instant case nobody presented any facts to the Court. The Government refused to act and, by opposing intervention, effectively blocked any examination by the District Court of the issues as to defendants' compliance with the Judgment.

This Court should give full consideration to the question whether plaintiff's opposition was, in itself, a sufficient basis for the District Court's refusal to exercise its discretion to permit intervention where intervention was the only means by which the District Court could have obtained full disclosure of the facts as to defendants' compliance with the terms of the Court's Judgment.

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*There is precedent for permitting intervention, as a matter of discretion, over objection of the Department of Justice. The Record on Appeal in *United States* v. *Swift*, 286 U. S. 106 (Record pp. 174, 182, 188) shows that, subsequent to the entry of a consent decree, two organizations were permitted to intervene over the objection of the United States. Intervention was permitted even though there was no action pending at the time, the intervention being made solely for the purpose of opposing a rumored application for modification of the consent decree.

CONCLUSION

The questions presented as to the application of Rules 24(a)(3) and 24(b) are of great importance. Antitrust consent decrees, although entered upon consent of the parties without adjudication, are decrees of the court and are continually subject to the control of the court. Aside from the language of Rule 24(a)(3) applicable to the instant situation, there are compelling reasons to permit intervention to enforce decrees if the plaintiff does not appear to present the facts. Without examination of the issues, a court is powerless to enforce its decree, powerless even to know the facts relating to its effectiveness. Whether a court retains continuing jurisdiction over its decree and the extent of a court's power to act independently of the wishes of one of the parties are substantial questions warranting plenary consideration by this Court.

Respectfully submitted,

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Appendix A

Appendix A

IN THE

UNITED STATES DISTRICT COURT

FOR THE EASTERN DISTRICT OF PENNSYLVANIA

UNITED STATES OF AMERICA *v.* RADIO CORPORATION OF AMERICA and NATIONAL BROADCASTING COMPANY, INC.	Civil Action No. 21743

SUR MOTION FOR LEAVE TO INTERVENE

Before Kirkpatrick, *J.*

Westinghouse has moved to intervene, alleging that certain proposed transactions on the part of the defendants would be a violation of the consent decree entered in this case. The decree retains jurisdiction for the purpose of enabling any of the parties to the final judgment, *and no one else,* to apply to this Court for further orders or directions. In view of this provision, this Court has no jurisdiction to allow the intervention sought. To hold otherwise would be to disregard the intentions of the parties when they consented to the decree and asked the approval of this Court.

The Government opposes the motion for intervention and has informed the Court that it has carefully investi-

gated and reviewed all the facts and reached the conclusion that the proposed Boston and San Francisco acquisitions do not violate the decree. In this state of facts, even if I had discretion to allow the intervention, I would not do so. The Government is concerned with the public interest and is satisfied that the conduct which Westinghouse complains of is not against that interest. It would not lead to an orderly administration of justice to allow intervention in this type of anti-trust litigation over the objection of the authorized agency of the United States in charge of enforcing a decree which it has obtained. The movant, if it is aggrieved, must be left to such private remedy as Congress may have provided for it.

The motion is denied.

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF PENNSYLVANIA

UNITED STATES OF AMERICA, Plaintiff, v. RADIO CORPORATION OF AMERICA and NATIONAL BROADCASTING COMPANY, INC., Defendants.	Civil Action No. 21,743

FINAL JUDGMENT

Plaintiff, United States of America, having filed its complaint herein on December 4, 1956; the defendants having filed their answer to the complaint, denying the substantive allegations thereof; the Supreme Court of the United States having rendered its opinion with respect to the third, fourth and fifth defenses raised by defendants' answer, as reported in UNITED STATES v. RADIO CORPORATION OF AMERICA, *et al.*, 358 U. S. 334 (1959); and plaintiff and the defendants by their respective attorneys having severally consented to the entry of this Final Judgment without trial or finding on any issue of fact herein, without adjudication by this Final Judgment of any issue of law herein, and without this Final Judgment constituting evidence or an admission by either of them in respect to any such issues;

NOW, THEREFORE, before any testimony has been taken, without trial or finding on any issue of fact herein, without adjudication by this Final Judgment of any issue of law

herein, and upon consent of the parties as aforesaid, it is hereby

ORDERED, ADJUDGED AND DECREED, as follows:

I.

The Court has jurisdiction of the subject matter of this action and of the parties hereto. Defendants having agreed, solely in order to permit entry of this Final Judgment, to waive the defense asserted by them that the complaint fails to state a claim upon which relief may be granted, the Court adjudges that the complaint states claims upon which relief may be granted against the defendants under Section 1 of the Act of Congress of July 2, 1890, entitled "An Act to protect trade and commerce against unlawful restraints and monopolies", commonly known as the Sherman Act, as amended.

II.

As used in this Final Judgment:

(A) "Person" means any individual, partnership, corporation, association or other legal entity;

(B) "NBC" means the defendant National Broadcasting Company, Inc.;

(C) "RCA" means the defendant Radio Corporation of America;

(D) "WRCV-TV" and "WRCV" mean, respectively, the television and the standard broadcast stations presently owned by NBC in Philadelphia;

(E) "NBC network affiliation agreement" means an agreement between NBC and the owner of a television

broadcast station for affiliation of the station with the television network of NBC;

(F) "Broadcast station" means a station licensed by the Federal Communications Commission in the television or standard broadcast band transmitting signals intended to be received by the general public;

(G) "National spot representation" means representation of a television broadcast station (other than such a station owned directly or indirectly by NBC or RCA) in sales by such station of nonnetwork advertising to national advertisers;

(H) "Television network" means an organization which provides interconnection with, and a national program service to, television broadcast stations not owned by such organization and which sells advertising time to national advertisers in connection with such programs; and

(I) "Market area" means a metropolitan area as defined by the United States Bureau of the Budget in its publication dated June 1959 entitled "Standard Metropolitan Statistical Areas"; if new issues of such publication replace the June 1959 issue, the most recent issue shall be used. To determine the population rank of a market area, the population statistics in the most recent issue of "Survey of Buying Power", a publication of the magazine "Sales Management", shall be used. A broadcast station shall be considered to be in a market area if the transmitter of such station is located within a radius of twenty-five miles from the main post office of the principal city in such area.

III.

The provisions of this Final Judgment applicable to either defendant shall apply to such defendant and to each of its subsidiaries, officers, directors, employees, agents, suc-

cessors and assigns, and to all other persons in active concert or participation with either such defendant who receive actual notice of this Final Judgment by personal service or otherwise.

IV.

NBC, and RCA during any period of time when it directly or indirectly controls or has a substantial ownership interest in a television network, are each enjoined and restrained from:

(A) Coercing or attempting to coerce any person to sell or otherwise transfer any ownership interest in any broadcast station to either defendant, or to any person directly or indirectly controlled by either defendant or in which either defendant directly or indirectly has a substantial ownership interest, by terminating or threatening to terminate or refusing or threatening to refuse to enter into, an NBC net work affiliation agreement with any other television broadcast station controlled by the same person or in which such person has a substantial ownership interest;

(B) Acquiring directly or indirectly any substantial ownership interest in any television broadcast station in the market area of New York, Chicago, Los Angeles, Detroit, Boston, San Francisco, or Pittsburgh, unless

(1) defendants shall have given written notice of the proposed acquisition to plaintiff, affording plaintiff opportunity to apply to this Court within thirty days after such notice for a determination by the Court as provided in clause (2) hereof, and

(2) if plaintiff shall have so applied, the Court shall have determined that the consent of the other party to the proposed acquisition was not obtained by acts or conduct of NBC or RCA relating in any way to the

negotiations for the proposed acquisition, which acts or conduct constitute either (a) an unreasonable restraint of trade (as to which issue plaintiff shall have the burden of proof) or (b) a violation of subsection (A) of this Section IV (as to which issue the defendants shall have the burden of proof);

Provided, however, that the shifting of a television broadcast station from one channel of the television broadcast band to another channel in the same market area, when such shifting results from a change in allocations by the Federal Communications Commission, shall not be deemed to be the acquiring of an ownership interest in a television broadcast station within the meaning of this subsection (B); and, *Provided further*, that any party hereto may at any time upon ten days' written notice to the other parties apply to this Court for a modification of the list of the seven market areas specified in this subsection (B), when the list specified, with Philadelphia included, no longer represents the first eight market areas in the United States in terms of population of the respective areas; and

(C) Undertaking the national spot representation of any television broadcast station other than those listed on Exhibit A hereto unless

(1) defendants shall have given written notice of the proposed spot representation to plaintiff, affording plaintiff opportunity to apply to this Court within thirty days after such notice for a determination by the Court as provided in clause (2) hereof, and

(2) if plaintiff shall have so applied, the Court shall have determined that NBC has not coerced the owner of such station to engage NBC for the national spot representation of the station by terminating or threatening to terminate or refusing or threatening to refuse to

enter into, an NBC network affiliation agreement with the station sought to be represented or with any other television broadcast station controlled by such owner or in which such owner has a substantial ownership interest, defendants having the burden of proof.

V.

Defendants are ordered and directed, on or before December 31, 1962, to sell, exchange or otherwise dispose of all right, title and interest in WRCV-TV and WRCV to a person or persons not controlled directly or indirectly by either defendant and in which neither defendant has any substantial ownership interest.

Such disposition, if accomplished by exchange, shall be an exchange for a station or stations not in the Philadelphia market area and such exchange shall not be effected unless

(1) defendants shall have given written notice of the proposed exchange to plaintiff, affording plaintiff opportunity to apply to this Court within thirty days after such notice for a determination by the Court as provided in clause (2) hereof, and

(2) if plaintiff shall have so applied, the Court shall have determined that the consent of the other party to the proposed exchange was not obtained by acts or conduct of NBC or RCA relating in any way to the negotiations for the proposed exchange, which acts or conduct constitute either (a) an unreasonable restraint of trade (as to which issue plaintiff shall have the burden of proof) or (b) a violation of subsection (A) of Section IV of this Final Judgment (as to which issue the defendants shall have the burden of proof).

If such disposition is accomplished otherwise than by exchange, defendants shall give plaintiffs written notice

of such proposed disposition at least thirty days prior to filing with the Federal Communications Commission any application for the Commission's consent to such disposition.

NBC and RCA are prohibited from acquiring any ownership interest in any television broadcast station in the Philadelphia market area until this Final Judgment shall terminate and be of no further force and effect.

NBC and RCA are prohibited, for a period of five years from and after the date of entry of this Final Judgment, from acquiring any ownership interest in any standard broadcast station in the Philadelphia market area. Any such acquisition after five years from the date of entry of this Final Judgment shall be subject to the procedure provided in subsection (B) of Section IV of this Final Judgment for acquisition of television broadcast stations in certain market areas.

VI.

Nothing contained in this Final Judgment shall be construed to require this Court to pass upon any transaction of acquisition or exchange by the defendants or any undertaking by them of national spot representation except to the extent expressly stated in subsection (B) and (C) of Section IV and in Section V of this Final Judgment.

Defendants shall not apply to the Federal Communications Commission for consent to any exchange or acquisition subject to the provisions of subsection (B) of Section IV or of Section V of this Final Judgment until after expiration of the time within which plaintiff may apply to this Court for a determination as provided therein or, if plaintiff so applies, until after such determination shall have been rendered by this Court. In the event of an appeal from any determination rendered by this Court pursuant to subsections (B) or (C) of Section IV or Section V of this Final

Judgment, defendants shall not, during the pendency of such appeal, consummate the exchange or acquisition involved or undertake the national spot representation involved.

VII.

For the purpose of securing compliance with this Final Judgment, duly authorized representatives of the Department of Justice shall, upon written request of the Attorney General or the Assistant Attorney General in Charge of the Antitrust Division, and on reasonable notice to either defendant made to its principal office, be permitted, subject to any legally recognized privilege, (a) reasonable access during the office hours of such defendant to all books, ledgers, accounts, correspondence, memoranda, and other records and documents in the possession or under the control of such defendant relating to any matters contained in this Final Judgment; and (b) subject to the reasonable convenience of such defendant and without restraint or interference from it, to interview officers or employees of such defendant, who may have counsel present, regarding any such matters. Either defendant, upon the written request of the Attorney General or the Assistant Attorney General in Charge of the Antitrust Division, and upon reasonable notice made to its principal office, shall submit such written reports with respect to any of the matters contained in this Final Judgment as from time to time may be necessary for the enforcement of this Final Judgment. No information obtained by the means provided in this Section VII shall be divulged by any representative of the Department of Justice to any person other than a duly authorized representative of the Executive Branch of the United States, except in the course of legal proceedings to which the United States is a party for the purpose of securing compliance with this Final Judgment, or as otherwise required by law.

VIII.

Jurisdiction is retained for the purpose of enabling any of the parties to this Final Judgment, and no one else, to apply to this Court at any time for such further orders or directions as may be necessary or appropriate in relation to the construction of or carrying out of this Final Judgment, for the modification or termination of any of the provisions thereof, and for the purpose of the enforcement of compliance therewith and the punishment of violations thereof.

IX.

This Final Judgment, and each and every provision hereof, shall terminate and be of no further force and effect nine years after the date upon which NBC finally disposes of all right, title and interest in WRCV-TV and WRCV, but in no event earlier than ten years after the date of entry of this Final Judgment.

Dated: September 22, 1959.

WILLIAM H. KIRKPATRICK,
Senior Judge.

We hereby consent to the making and entry of the foregoing Final Judgment:

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National Broadcasting Comp

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Attorneys for Defendants.

Exhibit A

KOA-TV, Denver

KSD-TV, St. Louis

WCKT-TV, Miami

WAVE-TV, Louisville

WRGB-TV, Schenectady

KONA-TV, Honolulu

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No. 484

In the Supreme Court of the United States

OCTOBER TERM, 1960

WESTINGHOUSE BROADCASTING COMPANY, APPELLANT

v.

UNITED STATES OF AMERICA, RADIO CORPORATION OF AMERICA AND NATIONAL BROADCASTING COMPANY

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA

MOTION OF THE UNITED STATES TO DISMISS OR AFFIRM

J. LEE RANKIN,
Solicitor General,

ROBERT A. BICKS,
Assistant Attorney General,

RICHARD A. SOLOMON,
RICHARD H. STERN,
BERNARD M. HOLLANDER,
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In the Supreme Court of the United States

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WESTINGHOUSE BROADCASTING COMPANY, APPELLANT

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UNITED STATES OF AMERICA, RADIO CORPORATION OF AMERICA AND NATIONAL BROADCASTING COMPANY

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA

MOTION OF THE UNITED STATES TO DISMISS OR AFFIRM

Pursuant to Rule 16, paragraphs 1(a) and 1(c) of the Revised Rules of this Court, appellee United States moves that the appeal be dismissed, or, alternatively, that the judgment of the district court be affirmed.

STATEMENT

This is a direct appeal from a district court judgment denying intervention in a civil antitrust suit

brought by the United States. Appellant sought to intervene on the ground that certain proposed transactions, designed to effectuate compliance with a consent judgment by which the suit had been settled, allegedly violated such judgment.

The Government's suit, brought against the Radio Corporation of America ("RCA") and its wholly-owned subsidiary, the National Broadcasting Company ("NBC"), charged that the defendants had engaged in a conspiracy, and had been parties to an agreement, in unreasonable restraint of trade. The facts relating to the case are set forth in this Court's opinion in *United States* v. *Radio Corporation of America*, 358 U.S. 334. There this Court held that approval by the Federal Communications Commission of certain aspects of the challenged transactions did not oust the district court of jurisdiction to entertain the Government's antitrust case, and reversed the district court's dismissal of the complaint. Following that decision, the case was settled through entry of a consent judgment, the provisions of which are set out in full at pages A3 to A12 of the Jurisdictional Statement.

The gravamen of the Government's complaint was that RCA and NBC had conspired to use NBC's power to withhold network affiliation to acquire television stations in two of five cities where NBC wished to acquire a station (Philadelphia, Detroit, Boston, San Francisco and Pittsburgh); and that, pursuant to such conspiracy and under threat of loss or denial of network affiliation in cities in addition to Philadelphia, appellant Westinghouse Broadcasting Com-

pany was induced to exchange its Philadelphia station (WRCV-TV) for NBC's Cleveland station (see *United States* v. *Radio Corporation of America*, *supra*, at 335-336).

Section V of the judgment (J.S. A8-A9) requires NBC to dispose of its Philadelphia television and radio stations by the end of 1962, provides for 30 days written notice to the Government of any disposition that is to be accomplished by an exchange of stations, and gives the Government the right to apply to the court for a determination that such exchange violates certain terms of the judgment.[1] Section IV(B) (J.S. A6-A7) provides for similar notice to the Government and opportunity for it to seek such a judicial determination should NBC seek to acquire a television station in Detroit, Boston, San Francisco or Pittsburgh.[2]

Shortly after the entry of the decree, NBC offered to exchange WRCV-TV for Westinghouse's Boston, Pittsburgh or San Francisco stations. Westinghouse counter-offered to re-exchange its Cleveland station for WRCV-TV (J.S. 6). No agreement was reached, however, and NBC subsequently agreed with RKO-General to exchange WRCV-TV for the RKO Boston station WNAC-TV, then a CBS affiliate.

NBC gave the Government notice of this proposed exchange. The Government made a thorough inves-

---

[1] Those terms require defendants to abstain from certain types of coercive activity or otherwise unreasonably restraining trade in making acquisitions.

[2] NBC already owned television stations in New York, Chicago, Los Angeles and Washington, in addition to Philadelphia.

tigation of the transaction, during which it interviewed 42 television network and station officials (including five officials of, and counsel for, appellant), and examined considerable documentary material bearing on the exchange (R. 103-110). On the basis of this investigation, the Government concluded that the proposed exchange in no way violated the consent judgment, and it advised the court that it did not intend to oppose it (R. 32-33).

Appellant then moved to intervene in the case.[3] It asserted that the exchange would probably mean the transfer of the NBC affiliation from its Boston station to that to be acquired by NBC; and it sought intervention in order to argue that the exchange would contravene the provisions of the consent decree (R. 26-27). The Government, after carefully considering the motion and supporting memoranda, concluded that they provided no basis for the claim that the decree had been violated, and therefore opposed intervention (R. 68-69, 72-73).[3]

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[3] Appellant asserts that the Government has shifted its position in this regard (J.S. 8), and quotes from the transcript of the oral argument below a passage which it claims supports this allegation. Examination of the transcript of oral argument as a whole (see particularly R. 34-35, 39) reveals that the Government merely stated that it hoped the court would hear any would-be intervenor on the issue of whether intervention was proper, although the Government would take the position that appellant could not intervene as a matter of right. Subsequently, when it had time to examine the motion papers, and the memorandum filed in support thereof, the Government took the position that permissive intervention was also not warranted (R. 68-69, 72-73).

The motion was heard and denied by District Judge Kirkpatrick, who had entered the consent decree. The court held (J.S. A1-A2) that appellant could not intervene as of right; and that, since the Government had "carefully investigated and reviewed all the facts" respecting the proposed exchange and had concluded that it did not violate the decree, the court would not allow discretionary intervention even if it could do so (J.S. A2). The court concluded (*ibid*):

> It would not lead to an orderly administration of justice to allow intervention in this type of antitrust litigation over the objection of the authorized agency of the United States in charge of enforcing a decree which it has obtained. The movant, if it is aggrieved, must be left to such private remedy as Congress may have provided for it.

ARGUMENT

This Court has made clear, in a number of cases, the very limited circumstances under which private parties, whose economic interests allegedly will be adversely affected, are entitled to intervene in post-decree proceedings in antitrust cases. *Missouri-Kansas Pipe Line Co.* v. *United States*, 312 U.S. 502; *Allen Calculators, Inc.* v. *National Cash Register Co.*, 322 U.S. 137; *Sutphen Estates, Inc.* v. *United States*, 342 U.S. 19; *Wometco Television & Theatre Co.* v. *United States*, 355 U.S. 40. See also *United States* v. *Loews Inc.*, 136 F. Supp. 13, 14 (S.D.N.Y.); *United States* v. *Bendix Home Appliances*, 10 F.R.D.

73 (S.D.N.Y.); *United States* v. *Bearing Distributors Company*, 18 F.R.D. 228 (W.D. Mo.). The present appeal presents still another example of a case where there is no intervention of right under the terms of the decree (see *Missouri-Kansas Pipe Line Co.* v. *United States*, *supra*) or under Rule 24 (a) of the Federal Rules of Civil Procedure, and where the trial court clearly did not abuse its discretion in denying permissive intervention under Rule 24(b).

1. Appellant's sole claim to intervention as of right (J.S. 9-10) is based on Rule 24(a)(3), which provides for intervention "when the applicant is so situated as to be adversely affected by a distribution or other disposition of property which is in the custody or subject to the control or disposition of the court". But the availability of this section has always been limited to persons having "an interest [in the property to be disposed of] known and protected by the law: a claim of ownership, or a lesser interest, sufficient and of the type to be denominated a lien, equitable or legal." 4 Moore's *Federal Practice* ¶ 24.09[2].

In the instant case the appellant has no legal interest in the Philadelphia television station, the disposition of which, pursuant to the consent decree, is subject to the control of the district court. Its claim to being adversely affected by disposition of the station stems solely from the potential loss of an NBC network affiliation by its Boston station, as the probable consequence of NBC's acquisition of a station in

Boston, in exchange for which NBC would transfer its Philadelphia station.

Such indirect competitive injury, however, even if clearly shown to be a probable result of the transaction, is not the type of interest which gives a right to intervention under Rule 24(a)(3). Thus, in *Allen Calculators Inc.* v. *National Cash Register Co., supra*, an antitrust consent decree precluded National from acquiring any competing manufacturer without prior permission of the court. When such permission was subsequently sought, Allen Calculators, a competitor of National's, sought to intervene in opposition. On appeal from an order denying such intervention, it claimed, *inter alia*, a right to participate under Rule 24(a)(3). But this Court summarily rejected the claim, stating "nor had it any interest in the distribution or disposition of property in the custody of the court so as to come under (3)" (322 U.S. at 141). See also *Ex Parte Leaf Tobacco Board of Trade*, 222 U.S. 578, where this Court rejected the claim of tobacco leaf sellers that they had a right to intervene in the proceedings on remand following the decision in *United States* v. *American Tobacco Co.*, 221 U.S. 106, although they alleged that they had a "vital interest" in relief which would dissolve the tobacco trust which had injured them. Such interest, the Court held (p. 581), was not "of such a character as to authorize them" to intervene as of right.

Moreover, even where a would-be intervenor's stake in property to be disposed of is sufficient to bring it within Rule 24(a)(3), it must also show that the al-

leged adverse effect of the disposition upon it is "imminent and onerous" rather than being merely "speculative and * * * contingent on unknown factors" (*Sutphen Estates* v. *United States*, *supra*, 342 U.S. 19, 22-23). Here, however, appellant made no showing whatsoever in the court below that it would in fact suffer financially or otherwise, as a result of the probable loss of an NBC affiliation. There are three commercial television stations in Boston and three national television networks, and there is no indication in the record before the district court that appellant cannot secure another affiliation of equal value to replace the one it may lose. In these circumstances, "appellant has not maintained the burden of showing that under Rule 24(a)(3) it may intervene as of right" (*id.*, p. 22).[4]

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[4] Since the appellant does not come under any of the provisions of Rule 24(a) setting forth the conditions as to when intervention is of right, and asserts no authority outside of the rule, the Court need not consider the district court's ruling that it had no jurisdiction to consider appellant's intervention request because of the express provision of the consent decree retaining jurisdiction "for the purpose of enabling any of the parties to this Final Judgment, and no one else, to apply to this Court" for further orders arising out of the decree (J.S. A11). We know of no court decision in conflict with this view. See *United States* v. *Loews Inc.*, 136 F. Supp. 13, 14 (S.D.N.Y.); cf. *Buckeye Coal & R. Co.* v. *Hocking Valley R. Co.*, 269 U.S. 42. *United States* v. *Swift & Co.*, 286 U.S. 106, 114, cited by appellant (J. S. 10), is not in point. While that case does stand for the proposition that a court has inherent jurisdiction to reopen a decree where equity demands, the question to which the district court directed its attention here was not whether it would have had discretion to permit appellant to intervene in any proceeding initiated by it or the parties to the decree, but whether, where

2. It is equally clear that the district court did not abuse its discretion in determining that no grounds for permissive intervention existed here. See *Brotherhood of R. R. Trainmen* v. *Baltimore & Ohio R. Co.*, 331 U.S. 519, 524. This conclusion was not reached, as appellant suggests (J.S. 12), "merely" on grounds that "since plaintiff opposed intervention * * * the Court would not as a matter of law exercise its discretion to permit intervention". The Government had previously advised the court that it did not expect to oppose the transfer since its comprehensive investigation (then not quite completed) had failed to disclose facts indicating that the decree had been violated or that any restraint of trade was involved (R. 32-33). At the same time, however, the Government had informed the court of appellant's intention to seek intervention and, though it indicated a belief that appellant had no right to intervene, it asked that appellant be heard on that motion (R. 34-35, 39). When the Government subsequently examined the motion and accompanying pleadings, and concluded that appellant (whose officers it had previously interviewed (R. 108)) had no new facts or legal theories to offer, the Government then also opposed permissive intervention (R. 68-69). The court reached its decision that the "orderly administration of justice" would not be served by permitting inter-

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none of the parties authorized by the judgment to initiate further proceedings had done so, a person not party to the decree could "intervene" for the purpose of inaugurating such a proceeding on its own.

vention ([redacted] A2) only (1) after pointing out that the Government had "carefully investigated and reviewed all the facts" and had concluded that there was no basis for intervention ([redacted] A1-A2), and (2) after it had had an opportunity to consider the written and oral presentation by the appellant as to the bases for its claim that the transfer violated the decree (see R. 52-67).

Even assuming that appellant has met its burden of showing that its claim and the main action have "a question of law or fact in common" within the meaning of Rule 24(b)(2) by its vague statements at page 11 of the Jurisdictional Statement, we submit that the court below properly denied permissive intervention. As the district court held in denying a similar motion in *United States* v. *Bendix Home Appliances*, 10 F.R.D. 73, 76-77 (S.D.N.Y.):[5]

> But certainly where, as in the case at bar, the United States has taken no action under the decree against the defendant; where, indeed, the United States has sifted the proposed intervenors' complaints and has decided to oppose the intervention, it would violate the statutory policy to allow the petition. Intervention would tend to make the private parties quasi attorneys general in enforcing the anti-trust laws, in contravention of 15 U.S.C.A. § 4 and 15 U.S.C.A. § 25 which explicitly require that Government suits

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[5] See also *United States* v. *American Society of Composers, Authors and Publishers*, 11 F.R.D. 511 (S.D.N.Y.); *United States* v. *General Electric Co.*, 95 F. Supp. 165 (D.N.J.); *United States* v. *Bearing Distributors Co.*, 18 F.R.D. 228, 231 (W.D. Mo.).

shall be under the direction of the Attorney General.

Moreover, for still another reason, the district court's rejection of permissive intervention was well within the bounds of its discretion. Here, as in the *Sutphen Estates* case, *supra*, "the claim of injury to appellant is too speculative and too contingent on unknown factors to conclude that there was an abuse of discretion in denying leave to intervene. The court had ample reason to prevent the administration of the decree from being burdened with a collateral issue that on this record can properly be adjudicated elsewhere" (342 U.S. at 23). If appellant in fact is aggrieved by the potential loss of its Boston NBC affiliation, it has available at least three possible paths for relief: (1) filing a complaint with the Federal Communications Commission, which must still pass upon the public interest aspects of the proposed transfers of license (see Section 310(b) of the Communications Act of 1934, as amended, 47 U.S.C. 310(b)); (2) instituting a private damage or injunctive action of its own under the antitrust laws (see 15 U.S.C. 15, 26); or (3) if it be not barred as contrary to public policy, bringing an action for breach of warranty arising out of NBC's alleged agreement, when it originally purchased the Philadelphia television station from Westinghouse, not to interfere with Westinghouse's NBC affiliation in Boston. (But cf. Federal Communications Commission Rules and Regulations, Section 3.658(c), 47 C.F.R. 3.658(c)). The district court was thus clearly acting within its reasonable discretion when it concluded

(R. A2) that appellant "if it is aggrieved, must be left to such private remedy as Congress may have provided for it".

CONCLUSION

The decision below is correct, and this appeal presents no substantial question. It is therefore respectfully submitted that the appeal should be dismissed or the judgment of the district court should be affirmed.[6]

J. LEE RANKIN,
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ROBERT A. BICKS,
Assistant Attorney General.

RICHARD A. SOLOMON,
RICHARD H. STERN.
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Attorneys.

NOVEMBER 1960

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[6] While we believe that the judgment below should be affirmed, we have drawn the motion in the alternative because, in some cases in which permissive intervention was in issue (as here), the Court, upon determining that no abuse of discretion was shown in the denial of intervention, has dismissed the appeal. E.g., *Sutphen Estates* v. *United States*, *supra*; see *Brotherhood of R.R. Trainmen* v. *Baltimore & Ohio R. Co.*, *supra*, 331 U.S. 519, 524-525.

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IN THE

Supreme Court of the United States

October Term, 1960.

No. 484.

WESTINGHOUSE BROADCASTING COMPANY, INC.,
Appellant,

v.

UNITED STATES OF AMERICA, RADIO CORPORATION OF AMERICA and NATIONAL BROADCASTING COMPANY, INC.,
Appellees.

On Appeal From the United States District Court for the Eastern District of Pennsylvania.

MOTION TO DISMISS OR IN THE ALTERNATIVE TO AFFIRM.

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IN THE

Supreme Court of the United States.

OCTOBER TERM, 1960.

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WESTINGHOUSE BROADCASTING COMPANY, INC.,
Appellant,

v.

UNITED STATES OF AMERICA, RADIO CORPORATION OF AMERICA AND NATIONAL BROADCASTING COMPANY, INC.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA.

MOTION TO DISMISS OR IN THE ALTERNATIVE TO AFFIRM.

Radio Corporation of America and National Broadcasting Company, Inc., pursuant to Rule 16(1)(c) of the Revised Rules of the Supreme Court of the United States, move that the decision of the district court, denying the motion by Westinghouse Broadcasting Company, Inc. for leave to intervene, be affirmed or that, in the alternative, the appeal by Westinghouse Broadcasting Company, Inc. from the decision of the district court be dismissed.

STATEMENT.

On December 4, 1956, the United States filed a civil antitrust suit against Radio Corporation of America ("RCA") and National Broadcasting Company, Inc. ("NBC") alleging a conspiracy involving the use of NBC network affiliation as a means of acquiring VHF television stations in certain major markets.[1] Specifically, the complaint charged that Channel 3 in Philadelphia [2] had been so obtained from Westinghouse in 1956 in exchange for NBC's Cleveland station and $3,000,000 in cash.

The 1956 exchange had been approved by the Federal Communications Commission after an extensive investigation. *National Broadcasting Company, Inc.*, 13 Pike & Fischer RR 374. NBC and Westinghouse had both sought that approval.[3]

The effect of the Commission's approval as a bar to the antitrust action came before this Court in *United States v. Radio Corporation of America*, 358 U. S. 334 (1959). This Court held the suit not barred.

Thereafter, following prolonged negotiations, the litigation was terminated by a Consent Decree approved by

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1. Appellant's description of the complaint in its Jurisdictional Statement (p. 2) is erroneous. As stated by the Government, the complaint did not challenge the "acquisition or ownership of stations as such" by RCA or NBC. Appendix A, *infra*, p. 21.

2. The repeated references by Westinghouse to the Philadelphia station as WPTZ are difficult to understand. The Philadelphia station has not been designated by the call letters WPTZ since the 1956 exchange. For the last 4 years, it has been designated WRCV-TV. To avoid the confusion thus created by appellant, the station is referred to herein as Channel 3.

3. See statement by the Chairman of the Commission that the Commission "must take them [Westinghouse] upon their word that the transfer was based upon the exercise of a prudent business judgment", 13 Pike & Fischer RR at 381. At no time has Westinghouse disavowed the approval it had sought, either in court or before the Commission.

the district court on September 22, 1959. The decree specifically provided that it was entered without trial or finding of fact on any issue, and that it did not constitute evidence or an admission with respect to any issue of law or fact. In presenting the Consent Decree to the district court the Department of Justice stated to the court that the decree was "in the public interest and fair and equitable to both sides".

Section IV(A) of the decree (Juris. Statement, Appendix B, pp. A-3 to A-11), enjoins NBC and RCA from coercing "any person" to sell a broadcast station by threatening to terminate or to refuse to enter into an NBC television network affiliation with any "other" television station "controlled by the same person". Section IV(B) enjoins NBC and RCA from acquiring any television station in eight named market areas, including Boston and San Francisco, unless prior written notice is given to the Department of Justice, affording the Government the opportunity to apply to the district court for a determination whether the consent of the other party to the acquisition was obtained by acts of NBC or RCA relating to the negotiations for the acquisition, which acts constituted an unreasonable restraint of trade or which constituted conduct barred by Section IV(A). If the Government were to apply to the district court for a determination, then the transaction could not be effected until the district court determined that the consent of the other party was not so obtained.

Section V of the Decree directs NBC to "sell, exchange or otherwise dispose of" Channel 3 by December 31, 1962. In the event the disposition is by exchange, the decree prescribes the same procedure as is provided by Section IV(B) for acquisitions.

Section VIII provides that the parties "and no one else" may apply to the district court for further orders or instructions.

Promptly after the entry of the Consent Decree, NBC in order to comply with the decree, undertook to dispose of Channel 3. It entered into an agreement with RKO General, Inc. ("RKO") to exchange NBC's television and radio stations for RKO's Boston stations. At the same time, NBC accepted an offer by RKO to purchase NBC's stations in Washington, D. C. for $11,500,000. Subsequently, NBC entered into an agreement to purchase a television station in San Francisco.

Pursuant to the provisions of the Consent Decree, NBC advised the Department of Justice of the Philadelphia-Boston exchange, first informally in December, 1959, later by formal written notice on April 8, 1960. NBC also advised the Department of the proposed sale of its Washington stations and of the proposed purchase of the San Francisco station (See Appendix A, *infra*, pp. 17-18).

The Department of Justice conducted an exhaustive investigation of these transactions.[4] In the course of this investigation, the claims and assertions by Westinghouse and others were specifically examined and considered.[5] The Department concluded that neither the facts disclosed by the investigation nor the theories presented in opposition

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4. The extensive nature of this investigation, of which the court below was apprised,—involving interviews of 42 persons from coast to coast and examination of all documents pertaining to the transactions—is described in a letter dated May 26, 1960 from the Acting Assistant Attorney General, Antitrust Division, Department of Justice, to the Chairman of the House Judiciary Committee. The letter is certified as part of the record on this Appeal and, for the convenience of the Court, it is attached hereto as Appendix A, *infra*, pp. 15-27.

5. Seven representatives of Westinghouse including its Board Chairman, its President and two Vice-Presidents were among the 48 persons interviewed by lawyers of the Antitrust Division of the Department of Justice.

to the proposed transactions disclosed any violation of the Consent Decree or the antitrust laws.[6]

The Department reported preliminarily to the district court on May 6, 1960, at which time it advised the court that it would probably not ask for any determination by the court with respect to the proposed transactions.

On May 9, 1960, the Department of Justice reported finally to the district court that the Government had concluded not to apply for any determination under the decree.[7]

On the same day, Westinghouse filed a motion for leave to intervene.[8] The essence of the motion was that, if NBC acquired a television station in Boston, the present affiliation contract of NBC and Westinghouse's Boston station would necessarily be terminated. This was generally alleged to violate the Consent Decree.

On June 3, 1960, the Government filed a memorandum with the district court opposing Westinghouse's motion for leave to intervene as a party, stating that:

> "* * * To the Government's view, the proffer of proof plus the theories presented in the joint memorandum [of Westinghouse and Chronicle] do not enlarge

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6. There is obviously no basis for Appellant's bald assertion of the "Government's failure to enforce the Judgment" or for its charge that the Government was derelict in its duty to the court (Juris. Statement, pp. 7, 12).

7. Thereafter, on June 3, 1960, NBC and RKO applied for Federal Communications Commission approval of the proposed transactions (FCC File Nos. BAL-3911, BALCT-122, BAL-3912, BALH-423, BALCT-123 and related dockets). The applications are currently pending before the Commission.

8. On the same date, The Chronicle Publishing Company filed a companion motion for leave to intervene but withdrew its motion on June 8, 1960 after the Government had filed its opposition thereto. Thereafter, The Chronicle Publishing Company filed a petition with the Federal Communications Commission opposing the proposed transactions. That action is presently pending (FCC Files Nos. BAL-3912, BALH-423, BALCT-123 and related dockets).

upon facts disclosed by our investigation or upon theories considered by the Government. Those facts and theories in our view do not disclose any violation either of the judgment or the antitrust laws and, therefore, do not provide us with a basis under the judgment for seeking Court determination of any such violation. * * *"[9]

Oral argument was heard on June 9, 1960. On June 27, 1960, the district court (Kirkpatrick, J.) denied the motion by Westinghouse to intervene. The Court held that intervention would be contrary to the specific terms of the Consent Decree by which jurisdiction was retained to enable the parties, "and no one else", to apply to the court for further instructions. The trial court then referred to the fact that the Government had "carefully investigated and reviewed all the facts and reached the conclusion" that the proposed transactions do not violate the decree. Finally, the Court said:

> "In this state of facts, even if I had discretion to allow the intervention, I would not do so. The Government is concerned with the public interest and is satisfied that the conduct which Westinghouse complains of is not against that interest."

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9. The Government's Memorandum is certified as part of the record on this appeal and, for the convenience of the Court, it is attached hereto as Appendix B, *infra*, pp. 28-29. Even if the point were relevant, the Memorandum makes plain that there is no warrant for Appellant's suggestion that the Government initially recognized a right in Westinghouse to intervene and then "shifted its position" (Juris. Statement, p. 8).

ARGUMENT.

The questions which this appeal seeks to have this Court consider are not substantial, and the appeal should be rejected.

A. The Question of Intervention as of Right Under Rule 24(a)(3).

Appellant contends for a right to intervene on the premise that under the Consent Decree, "[t]he District Court had within its control the disposition of" Channel 3. It thus seeks to bring its claim within the language of Rule 24(a)(3), F. R. C. P. th[redacted]ntervention as of right may be had

> "* * * when the applicant is so situated as to be adversely affected by a distribution or other disposition of property which is in the custody or subject to the control or disposition of the court * * *".

Rule 24(a)(3) expressly contemplates in the first instance a situation in which the district court actually controls a property or has power to dispose of it or to order its disposal. 4 *Moore, Federal Practice*, Sec. 24.09, p. 58 (2d ed.). There is no such control or power in the district court under the Consent Decree in this case.

Under the terms of the Consent Decree, the duty of NBC and RCA to "sell, exchange or otherwise dispose of" Philadelphia Channel 3 by December 31, 1962 is absolute. If Channel 3 is sold or "otherwise dispose[d] of", the district court has no function whatever with respect to it. If the disposition of Channel 3 is by exchange, with another station, then the exchange must wait upon notice to the Department of Justice and the Department's determination whether to make an application to the court. If, as here, the Department decides that there is no basis for an application to the

court and therefore does not make one, the Consent Decree plainly contemplates that the exchange may go forward without the exercise by the court of any function whatever. If the Department does seek a determination, the court's sole function is to pass upon the question whether the kind of conduct prohibited by the decree was present. If that issue should be determined adversely to RCA and NBC, the effect would be that that particular exchange could not be completed. In any event, Channel 3 would still not be "subject to the control or disposition of" the court within the meaning of Rule 24(a)(3).

Even if it were to be assumed, arguendo, that Philadelphia Channel 3 is property within the control of the court, Westinghouse still has no standing to intervene as of right. The interest protected by Rule 24(a)(3) must be a "* * * direct and immediate interest in a res which is the subject of the suit * * *". *United States v. California Co-operative Canneries*, 279 U. S. 553, 556 (1928).[10] Further, the direct and immediate interest "must be an interest known and protected by the law: a claim of ownership, or a lesser interest, sufficient and of the type to be denominated a lien, equitable or legal." 4 *Moore, Federal Practice*, Sec. 24.09, 45 (2d ed.).

Here, Westinghouse plainly has no direct and immediate interest in Philadelphia Channel 3; indeed it has no interest whatever. Westinghouse expressly concedes that the interest it asserts is not in Philadelphia Channel 3 but in NBC's acquisition of a Boston station.

The Boston station is certainly not a res before the court. But even if it were, Westinghouse cannot show,

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10. This case was decided prior to the effective date of the Federal Rules. However, there has been no change in the requirement that there be an interest in property before the court. See *United States v. Columbia Gas & Electric Corp.*, 28 F. Supp. 116, 120 (D. Del. 1939), *cert. denied*, 309 U. S. 687 (1940); 4 *Moore, Federal Practice*, Secs. 24.05 and 24.09, 45 (2d ed.).

as to the Boston station, the required interest "known and protected by the law", 4 *Moore, supra.* The sole interest asserted by Westinghouse in NBC's proposed Boston acquisition is that if the Boston acquisition takes place, NBC will not require an affiliate in Boston. Hence, Westinghouse's present two-year NBC network affiliation in Boston would not be renewed at the expiration of its present term. But that interest is not a legally cognizable right. For under FCC regulation § 3.638(c), a network affiliation contract is limited to a two-year period and there is no right to a renewal. See *Federal Broadcasting System v. American Broadcasting Co.*, 167 F. 2d 349 (C. A. 2, 1948), *cert. denied*, 335 U. S. 821 (1948).

Thus, appellant clearly lacks standing to intervene as of right under Rule 24(a)(3) and its reliance on the *Sutphen Estates v. United States*, 342 U. S. 19 (1951), to show the contrary, is misplaced. That case involved a reorganization proceeding pursuant to a decree in which the property involved was clearly within the control and disposition of the court and in which the intervenor had the required direct interest. The court was obligated to determine the disposition to be made of the applicant's property and it was with respect to that property that the applicant, a lessor, claimed he would be adversely affected.

It might be noted that in *Sutphen* intervention was ultimately denied because the intervenor failed to show that he was adversely affected. In the instant case, in addition to the other failings in its position, Westinghouse has also failed to show that it will be adversely affected by the loss of the NBC network affiliation in Boston.[11]

B. The Question Posed by Westinghouse Whether the District Court "Had Not Surrendered Jurisdiction."

Section VIII of the Consent Decree accorded a right to the parties "and no one else" to apply to the district

11. Boston is a 3-station market, and since there are 3 networks each station necessarily has a network affiliation.

court for further orders or directions. Westinghouse seeks to draw attention from its lack of standing to intervene by asking this Court to consider, abstractly, the ruling of Judge Kirkpatrick rejecting Westinghouse's motion on the ground, inter alia, of the limitations of Section VIII. It is said that an important question is thus presented as to the "court's power to act independently of the wishes of one of the parties" (Juris. Statement, page 13). We submit that no novel or important question is presented.

Appellant's argument is based on this Court's observation in *United States v. Swift*, 286 U. S. 106 (1932) that a court possesses inherent power to modify its decree in adaptation to changed circumstances.

Swift involved an application by parties for relief from a portion of a Consent Decree on the ground that the restraint, in view of changed circumstances, had become oppressive. The decree had retained jurisdiction for taking such further action "as may become necessary" and for "entertaining at any time hereafter any application which the parties may make". 286 U. S. at pp. 109-110. The court rejected the contention that the decree could not in any manner be changed. After noting that "Power to modify the decree was reserved by its very terms", the court stated that "a court does not abdicate its power to revoke or modify its mandate if satisfied that what it has been doing has been turned through changing circumstances into an instrument of wrong" (286 U. S. at pp. 114-115). From this, Westinghouse contends for the general proposition that the district court in the circumstances of this case must ignore the terms of the Consent Decree for the purpose of permitting an application to intervene (Juris. Statement, p. 10).

We suggest that the *Swift* case has no direct bearing on the question which Westinghouse presents. The application there was to modify the decree and was made by parties subject to it. The decree had specifically provided

for such applications. The Court's recognition of the right of a party to obtain modification either under the decree or under the Court's equity power to modify the injunctive provisions of a decree where hardship is allegedly imposed by it, does not sustain Westinghouse's attempt here, not to modify, but to intervene in the teeth of a Consent Decree provision on retained jurisdiction.

Provisions such as that contained in Section VIII, leaving power in the parties "and no one else" to apply to the court under consent decrees, have been enforced according to their terms. *United States v. Loew's Inc.*, 136 F. Supp. 13 (S. D. N. Y. 1955); *United States v. Loew's Inc.*, 20 F. R. D. 423 (S. D. N. Y. 1957). These decisions recognize that jurisdiction in an antitrust suit is exhausted by a decree accomplishing the intended purpose; and that, if jurisdiction be specifically retained in the decree, it can only exist within the limitations of the retention provision. The reasoning applies here. The Consent Decree was accepted by NBC as a termination of the litigation. A carefully delineated power to apply to the court under certain expressed circumstances existed in the Department under the agreed upon administrative machinery of the decree. Beyond this, the Consent Decree was final.

The decisions in the *Loew's* cases are in accord with this Court's approach to the relationship between consent decree provisions and petitions to intervene in *Missouri-Kansas Pipe Line Co. v. United States*, 312 U. S. 502 (1941). There, the district court had denied as a matter of discretion an application for leave to intervene by a non-party. The Consent Decree specifically provided that a protected non-party could, upon application, become a party to enforce rights. This Court reversed the district court, holding that the terms of the Consent Decree controlled. We accordingly suggest that Judge Kirkpatrick's view as to the effect of Section VIII is correct. But the question is abstract in this

case. Questions as to the relationship between intervention and the provisions of a consent decree need not be reached where, as here, the person seeking to raise the question lacks standing to intervene under any part of Rule 24, F. R. C. P. (see *supra*, pp. 7-9; *infra*, pp. 12-13) and cannot raise the issue.

C. The Question of the District Court's Discretion Under Rule 24(b).

Westinghouse attacks the refusal of the district court to permit it to intervene, stating that the district court held that, in view of the Government's opposition, "* * * the Court would not as a matter of law exercise its discretion * * *" (Juris. Statement, p. 12). Having thus characterized the district court holding, appellant then charges that "* * * nobody presented any facts to the Court. The Government refused to act and, by opposing intervention, effectively blocked any examination by the District Court of the issues as to defendants' compliance with the Judgment" (Juris. Statement, p. 12).

Westinghouse is incorrect in both phases of this argument. The court below did not decline to exercise its discretion "as a matter of law". It is also untrue that "nobody" presented any facts to the court". On the contrary, the Government conducted an extensive investigation of the proposed exchange and reported its investigation to the court. See Appendix A, *infra*, But, again, these questions need not be reached since Westinghouse cannot qualify under Rule 24(b), F. R. C. P., the rule on permissive intervention to which this phase of appellant's argument is directed.

Rule 24(b) permits intervention where "an applicant's claim or defense and the main action have a question of law or fact in common".

It may well be doubted whether there is any pending "main action" in the court below in which intervention could

be allowed. "An existing suit within the court's jurisdiction is a prerequisite" of intervention. *Hofheimer v. McIntee*, 179 F. 2d 789 (C. A. 7, 1950). Here the final decree was entered in September, 1959, and the action was never opened by the Government under Section (V)(2).

However, even if, arguendo, the exchange were to be considered a pending "main action", appellant nonetheless fails to present the required common question.

The exchange is prohibited only where the consent to the exchange results from NBC's use of its affiliation power against a station owner in one market to compel a transfer from that owner to NBC in another market or where the consent to such exchange is effected by conduct relating to the exchange which conduct is in restraint of trade.

Appellant makes no claim that the consent of RKO to the proposed Philadelphia-Boston exchange was coerced by NBC threats. Appellant complains that, as a result of the proposed exchange, it will lose its NBC network affiliation in Boston.[12] That raises an issue entirely foreign to the terms of the decree relevant to the exchange and, indeed, entirely foreign to those initially embraced by the antitrust suit. On other occasions, similar attempts to intervene have been rejected. See *United States v. Bearing Distributors Co.*, 18 F. R. D. 228 (W. D. Mo. 1955) (opinion by Judge, now Mr. Justice Whittaker); *United States v. Bendix Home Appliances, Inc.*, 10 F. R. D. 73, 76, 77 (S. D. N. Y. 1949); *United States v. ASCAP*, 11 F. R. D. 511, 513 (S. D. N. Y. 1951).

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12. Denial of intervention has not left appellant without access to a forum. After the district court denied Westinghouse's motion for leave to intervene, Westinghouse filed a petition with the Federal Communications Commission, which is almost identical with the motion. This petition, opposing the Philadelphia-Boston exchange between NBC and RKO, is presently pending (FCC File Nos. BAL-3912, BALH-423, BALCT-123 and related dockets).

CONCLUSION.

For the reasons set forth above, the present appeal presents no substantial question for the decision of this Court, and the appeal from the decision of the district court should be dismissed, or in the alternative the decision should be affirmed.

Respectfully submitted,

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November 18, 1960

APPENDIX A.

DEPARTMENT OF JUSTICE
Washington,

May 26, 1960

Honorable Emanuel Celler
House of Representatives
Washington 25, D. C.

My dear Congressman Celler:

This responds to your telegram, dated May 10, and received by me May 11, 1960. There you state that you are "profoundly disturbed by" this Department's "failure to object in the Federal District Court of Philadelphia to the plan of National Broadcasting Company and Radio Corporation of America to acquire television stations in Boston and San Francisco". Such "failure", your wire goes on, "makes a nullity of the decree or demonstrates that the decree is worthless". In this light, you request an "immediate report . . . concerning all facets of this matter".

In response, this Department did not move to block these acquisitions because, after the most thorough investigation and study of both transactions, no one who had worked on the case or the decree found any reasonable basis for contending that "acts or conduct of NBC or RCA relating . . . to the negotiation for the proposed acquisition" had transgressed the Court's decree in *United States v. Radio Corporation of America and National Broadcasting Company, Inc.* (Civil No. 21,743, E. D. Pa. 1956). Amplifying the bases for this conclusion, this "report", as per your request, (1) sketches the decree and the proceeding which gave it rise; (2) describes this Department's investigation under the decree of NBC's proposed Boston and San Francisco acquisitions; and (3) analyzes, in light

of that investigation, the grounds for this Department's judgment that the proposed acquisitions would not run afoul of the decree.

I.

By complaint filed December 4, 1956, the United States charged RCA and NBC with combining or conspiring to obtain VHF television stations in five of the eight primary markets by the unlawful use of NBC's power to grant to, or withhold from, non-network station owners, NBC network affiliation.[1] The "combination or conspiracy" alleged was "in part" "effectuated", in the complaint's words, by RCA's and NBC's "depriving WBC and Westinghouse Electric of WBC's VHF station in the Philadelphia market . . . ." And all the "means" by which this plan was carried out, subparagraphs (a), (b) and (c) of complaint paragraph 20 allege, involved use of NBC's affiliation power in *one* market to obtain an advantage in *another*.

To remedy the violations, the complaint prayed for "such divestiture of the assets of the defendant NBC as the Court may deem necessary and appropriate." Spelling out those "assets" referred to in the complaint's prayer, the United States, by answer to interrogatories (filed April 30, 1957), specified only "Divestiture of WRCV-TV and WRCV, Philadelphia, Pennsylvania, by sale to a non-network purchaser." Relief addressed to NBC's dual role as program source and national spot representative was also sought.

Tracking closely relief specified in the complaint's prayer, Paragraph V of the Final Judgment, entered September 22, 1959, "ordered and directed" RCA and NBC

1. To establish the existence of an unlawful conspiracy at trial, the Government planned to show the common design of RCA and NBC for station ownership, prove that the activities directed against Westinghouse in connection with the Philadelphia transaction were unlawful, and thus prove that the unlawful activities in Philadelphia had rendered the common design illegal.

"on or before December 31, 1962, to sell, exchange or otherwise dispose of all right, title and interest in WRCV-TV and WRCV to a person or persons not controlled directly or indirectly by either defendant . . . ."[2] The disposition of Philadelphia and the acquisition by NBC of a station in any of the remaining seven primary television markets in the country are made subject to notice to the Government and possible Court determination under the provisions of subparagraphs (1) and (2) of Sections IV(B) and V.[3] The Court's jurisdiction in the event of a determination pursuant to these provisions of the decree is directed to "acts or conduct of NBC or RCA relating in any way to the negotiations" preceding any transfer of stations within these decree sections. By way of additional relief, Paragraph IV(C) limited NBC's "Undertaking the national spot representation of any television broadcast station" other than those represented by NBC at the decree's entry.

II.

The decree procedures and standards governing NBC's acquisition, via exchange or otherwise, of any television station in any of the seven primary television markets, delimit this Department's responsibility vis a vis NBC's proposed Boston and San Francisco purchases. In this context then, just how did this Department proceed to discharge its responsibility?

On April 8, 1960, NBC counsel, as per decree Paragraphs IV and V, gave formal written notice of the proposed acquisition. Some 3½ months before, however, NBC counsel informally notified the Department that a tentative

2. Paragraph V prohibits NBC and RCA "from acquiring any ownership interest in any television broadcast station in the Philadelphia market area" for a minimum of ten years.

3. Paragraph IV(A), incorporated by reference in Paragraph V, enjoined defendants from using the network affiliation power in one market to obtain station properties in another. And both Paragraphs IV and V subject, in addition, such acquisitions to "an unreasonable restraint of trade" test.

agreement had been reached for an exchange of NBC's Philadelphia stations for RKO General's Boston stations, and for the acquisition of NBC's Washington station by RKO General for $11,500,000. We were also informed at that time (in mid-December 1959) that negotiations had been undertaken for the acquisition by NBC of a station in San Francisco. Regarding both transactions, we were told that no formal agreements had yet been reached.

About one month later, on January 15, 1960, we were advised that NBC and RKO General had filed with the Federal Communications Commission a tentative letter agreement embodying the transactions with RKO General already described. And, on January 29, 1960, the Department was informally notified by NBC counsel that an understanding had been reached by NBC for the purchase of KTVU, San Francisco.

As soon as the agreements were finalized, our investigation began. In the course of that investigation interviews were conducted with some 48 persons, as detailed in the attached Appendix. In addition, documents were obtained from the principals involved in the transactions and from a number of the persons interviewed. Reinterviews of key persons from NBC and RKO General were conducted under oath.

III.

This extensive investigation just described was molded to probe the possible validity of (among others) the following theories of Judgment violation: (1) The NBC negotiations with RKO General as constituting either a restraint of trade directed against competitors of NBC and RKO General or an abuse of NBC's network power cognizable under the decree; (2) The negotiations in San Francisco as a restraint of trade; and (3) Persistence of the RCA-NBC conspiracy alleged in the Government's 1956 complaint.

(1) *The NBC negotiations with RKO General.* Fully explored was any possible use by either NBC or RKO General of the prior connection between RKO General and KTVU to obtain KTVU for NBC. The facts disclosed by our investigation showed no present nor prior connection between RKO General and KTVU from which it could be inferred that RKO General possessed some sort of leverage with respect to KTVU. We also considered whether a straight tie-in theory might be applied to the negotiations between NBC and RKO General. For, in the agreement between NBC and RKO General the latter conditioned its willingness to relinquish Boston upon NBC's agreement to sell Washington. NBC, on the other hand, conditioned its agreement to give up Washington on its ability to obtain a suitable replacement market. Thus, it was argued, the deal tied together several television markets in one transaction thereby excluding other prospective purchasers who might have desired to obtain any one of the stations in Philadelphia, Washington, Boston or San Francisco. Evidence obtained, however, showed no use of economic leverage by NBC. Without such economic leverage, any tie-in theory seemed inapplicable.

Since RKO General was a multiple station owner, every effort was made to determine whether NBC had abused its affiliation power, as alleged in the complaint with respect to Westinghouse, to obtain an advantage over RKO General. However, no facts were developed showing the use of the affiliation power by NBC as a negotiating weapon in its dealings with RKO General. As a matter of fact, the evidence obtained seems more consistent with the proposition that RKO General occupied a stronger bargaining position than NBC.

(2) *The NBC negotiations with KRON.* Having in mind the dual jurisdiction of the Court under the decree, on the one hand, and the FCC with regard to matters of television ownership generally, on the other, the negotia-

tions between NBC and KRON were carefully scrutinized for any *acts or conduct relating to the negotiations* showing abuse of the network affiliation power. From facts obtained, we concluded that acts or conduct of NBC amounting to a restraint of trade cognizable under the decree could not be established.

(3) *Persistence of the RCA-NBC conspiracy alleged in the Government's 1956 complaint.* The Division gave extensive consideration to the possibility that the instant transactions constituted the final stage of the RCA-NBC conspiracy alleged in the complaint. Recall that the initial conspiracy depended for its illegality upon the unlawful means, not found here, which were used by NBC to gain advantage in one market by use of the affiliation power with respect to another. In light of the presumption that the conspiracy had ended with the entry of the Final Judgment, we thought it highly unlikely that the Court would find this initial conspiracy between NBC and RCA to have been resurrected or to have survived, solely on the ground that one end sought by the conspirators had been achieved with the acquisition by NBC of stations in Boston and San Francisco.

We also considered whether NBC, in negotiations with Westinghouse, had attempted to exercise its affiliation power to force Westinghouse to give up Boston. Our investigation did not develop facts to support an allegation that Westinghouse had been the subject of *acts or conduct* by NBC from which it could be established that the network power of NBC had been used with respect to one market in order to gain an economic advantage in another.

True, the loss of NBC affiliation by Westinghouse and KRON may result in economic injury to their broadcasting operations in Boston and San Francisco. Such injury, however, is attributable to exercise by NBC of its option to terminate the affiliation relationship rather than to acts or conduct of RCA or NBC improper under the decree.

Mindful, however, of the impact of the proposed acquisitions upon Westinghouse and KROX, the Division informed Judge Kirkpatrick that NBC had agreed "not to file an application before the Federal Communications Commission—which they would have to do after we let our thirty day period run, in order to get approval of the transactions involved—until Monday, May 16, so that the Court could hear any persons, if there were such", who might petition the Court during the period. The Government sought by this action to avoid any possible claim that NBC's filing for approval with the FCC (upon the expiration of the thirty day notice period specified in the decree) would bar as untimely petitions by Westinghouse and KROX.[4]

Since our investigation did not show violation of the Final Judgment, the result may well be that complainants are left to plead their cause in other judicial forums or before the FCC. Such course is, I feel, consistent with dual antitrust and FCC jurisdiction and with the Supreme Court's ruling in *United States v. RCA and NBC*. Neither that decision nor the judgment itself intrudes upon powers or responsibilities of the FCC in its application of the statutory standard of "public interest, convenience and necessity." In short, our decision not to move in Court here was based, as it had to be, solely on application to facts unearthed of the decree's precise standards, tailored to remedy a particular abuse. Thus viewed, such decision reads not on the broad "public interest" issue to be considered by the FCC.

To sum up, the original complaint was concerned with the allegedly unlawful acquisition of the Westinghouse Philadelphia stations, not with NBC's acquisition or ownership of stations as such. Therefore, the complaint sought and the decree achieved divestiture of these stations. By the same token, neither complaint nor decree sought to

4. As you know, Westinghouse and KROX filed motions for leave to intervene with the Court on May 9, 1960.

block NBC from selling its Washington stations or from acquiring stations elsewhere. After careful investigation and review of the facts, we concluded that NBC's proposed Boston and San Francisco acquisitions did not violate the decree. Hence, no request by the Department was made for Court determination under the decree.

I appreciate your long standing interest in problems of antitrust and television. This interest has been reflected in numerous hearings and inquiries by your Antitrust Subcommittee. It is in this light that we burden you with this lengthy report.

Please do not hesitate to call upon us for any further clarification that you may deem appropriate.

Sincerely yours,

/s/ ROBERT A. BICKS,
Robert A. Bicks,
Acting Assistant Attorney General
Antitrust Division.

APPENDIX [of Department of Justice].

The following persons were interviewed by Mr. Bernard M. Hollander of the Antitrust Division, in connection with this Division's Judgment investigation in *United States v. RCA and NBC*, between January 21, 1960 and April 27, 1960 at the indicated locations. In virtually every instance, Mr. Hollander was accompanied by another member of the Division staff from either our Washington or San Francisco Office:

RKO General, Inc.

January 21, 1960—Thomas F. O'Neil, Pres., New York, N. Y.
—John B. Poor, Vice-Pres., New York, N. Y.

March 18, 1960 —Wilton Gunsendorfer, ex-Management Consultant, Los Angeles, Calif.

March 31, 1960 —George R. Ruppel, ex-Vice-Pres. & Treas., New York, N. Y.
—Arnold Kaufman, ex-Broadcasting Div. Dir. for Boston and Washington, New York, N. Y.

April 5, 1960 —W. Theodore Pierson, Counsel, Washington, D. C.

Station KRON-TV

March 14, 1960 —Sheldon G. Cooper, San Francisco, Calif.
—Charles Thieriot, Pres., San Francisco, Calif.
—Harold See, Gen. Mgr., San Francisco, Calif.
—Lester Spillane, Counsel, San Francisco, Calif.

Station KTVU

March 15-16, 1960—William D. Pabst, Gen. Mgr. and part owner, Oakland, Calif.
—Ward Ingrim, Sales Mgr. and part owner, Oakland, Calif.

March 16, 1960 —Stoddard F. Johnston, Salesman and part owner, Oakland, Calif.

March 17, 1960 —Willet H. Brown, part owner, Los Angeles, Calif.
—Harry R. Lubcke, part owner, Los Angeles, Calif.
—Edwin W. Pauley, part owner, Los Angeles, Calif.
—Orris R. Hedges, Counsel for Pauley, Los Angeles, Calif.
—Claude L. Cameron, Asst. to Pauley, Los Angeles, Calif.

March 18, 1960 —John A. Kennedy (telephone interview), La Jolla, Calif.

April 11, 1960 —Andrew G. Haley, ex-Counsel for Pauley, Washington, D. C.

Westinghouse Broadcasting Company

February 9, 1960—Donald McGannon, Pres., Washington, D. C.
—Joseph Baudino, Vice-Pres., Washington, D. C.
—John Steen, Counsel, Washington, D. C.

March 7, 1960 —George Turner, Counsel, Washington, D. C.

March 14, 1960 —Philip G. Laskey, Vice-Pres., West Coast Operations, San Francisco, Calif.

March 29, 1960 —E. V. Huggins, Board Chairman, Washington, D. C.
—George Turner, Counsel, Washington, D. C.

American Broadcasting Company

March 30, 1960 —John H. Mitchell, Vice-Pres. and Gen. Mgr. KGO-TV, San Francisco, Calif. (Interviewed by Gilbery Pavlovsky, San Francisco Office)

April 1, 1960 —Oliver Treyz, Pres., ABC Television Network, New York, N. Y.
—Julius Barnathan, Vice-Pres., Station Relations, New York, N. Y.
—Robert Coe, Mgr., Station Relations, New York, N. Y.

Columbia Broadcasting System, Inc.

April 1, 1960 —Dr. Frank Stanton, Pres., New York, N. Y.
—William B. Lodge, Vice-Pres., Station Relations, New York, N. Y.

Station Brokers

March 15, 1960 —Lindsay Spight, Television Communications Inc., San Francisco, Calif.

March 17, 1960 —Colin Selph, Blackburn & Company, Los Angeles, Calif.

April 4, 1960 —W. R. Twining, San Francisco, Calif. (Interviewed by Mr. Pavlovsky)

April 27, 1960 —Herbert Scheftel, New York, N. Y.
—Alfred Burg, New York, N. Y.

In connection with the above interviews, relevant documents were furnished to the Department by RKO General, KRON, KTVU, CBS, Edwin W. Pauley, Willet H. Brown, Milton Gunsenderfer, and W. Theodore Pierson.

Beyond interviews with persons other than defendants' officers and employees, NBC and RCA were requested by letter on March 3, 1960 to provide the Department with all writings relating in any way to (1) the NBC-RKO General transactions, and (2) the San Francisco negotiations. On March 21, 1960, NBC and RCA forwarded the documents requested. On April 11, 1960, the Division asked NBC and RCA by letter to make further search of certain of their files. On April 19, 1960, the Division notified NBC and RCA in writing of its intention to interview certain persons pursuant to paragraph VII of the Judgment. The following persons were then interviewed by Messrs. Bernard M. Hollander and Raymond M. Carlson of the Division staff at the indicated locations:

National Broadcasting Company, Inc.

April 26, 1960—P. A. Sugg, Exec. Vice-Pres., Owned and Operated Stations and Spot Sales, New York, N. Y.
—David C. Adams, Sr. Exec. Vice-Pres., New York, N. Y.
—Thomas E. Ervin, Vice-Pres. and Gen. Atty., New York, N. Y.

April 27, 1960—Robert E. Kintner, Pres., New York, N. Y.
—Robert W. Sarnoff, Board Chairman, New York, N. Y.
—Harry Bannister, Vice-Pres., Station Relations, New York, N. Y.

Radio Corporation of America

April 27, 1960—John L. Burns, Pres., New York, N. Y.

On May 5, 1960, the Division requested that RKO General produce all documents of that company relating to the Boston-Philadelphia-Washington transaction and arranged for interview under oath with the key persons at RKO General and NBC involved in that transaction. Messrs. Hollander and Carlson examined the documents of RKO General on May 6, 1960 and interviewed Thomas F. O'Neil and John B. Poor for the second time, this time under oath. The following day, May 7, 1960, P. A. Sugg, NBC Vice-President, again was interviewed, this time under oath.

APPENDIX B.

IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA.

UNITED STATES OF AMERICA, *Plaintiff*, v. RADIO CORPORATION OF AMERICA and NATIONAL BROADCASTING COMPANY, INC., *Defendants.*	Civil Action No. 21743.

MEMORANDUM OF PLAINTIFF IN OPPOSITION TO MOTIONS OF CHRONICLE PUBLISHING COMPANY AND WESTINGHOUSE BROADCASTING COMPANY FOR LEAVE TO INTERVENE.

Plaintiff, United States of America, takes the following position with regard to the motions filed herein by Chronicle Publishing Company and Westinghouse Broadcasting Company for leave to intervene under Rule 24 of the Federal Rules of Civil Procedure:

1. We oppose the granting of the motions to intervene. Movants have misconstrued our statement to the Court on May 6, 1960, that we would not oppose their being heard, to mean that we would support their right to be heard as parties. We believe that the Court should follow the numerous precedents and deny movants leave to intervene as parties.

2. We do, however, urge the Court, in its discretion, to hear movants, but solely on the question whether their

proffer of proof and theories warrant this Court directing the Government to submit the matter now for a determination under the judgment. To the Government's view, the proffer of proof plus the theories presented in the joint memorandum do not enlarge upon facts disclosed by our investigation or upon theories considered by the Government. Those facts and theories in our view do not disclose any violation either of the judgment or the antitrust laws and, therefore, do not provide us with a basis under the judgment for seeking Court determination of any such violation. However, this decree is a judgment of this Court. And the Court might find it helpful, considering whether its judgment has been transgressed, to hear views of the would-be intervenors.

Respectfully submitted,

/s/ BERNARD M. HOLLANDER,
Bernard M. Hollander,

/s/ RAYMOND M. CARLSON,
Raymond M. Carlson,
Attorneys
United States Department of Justice,
Washington, D. C.,

Dated: June 3, 1960

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JAMES R. BROWNIN

IN THE

Supreme Court of the United States

OCTOBER TERM, 1960

No. 484

WESTINGHOUSE BROADCASTING COMPANY, INC., *Appellant*,

vs.

UNITED STATES OF AMERICA, RADIO CORPORATION OF AMERICA and NATIONAL BROADCASTING COMPANY, INC., *Appellees*.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA

BRIEF IN OPPOSITION TO MOTIONS TO DISMISS OR AFFIRM

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BRIEF IN OPPOSITION TO MOTIONS TO DISMISS OR AFFIRM

STATEMENT

Pursuant to Rule 16(3) of the Rules of this Court, appellant submits this Brief in opposition to the motions to dismiss or affirm which have been filed by appellees. The statement of the case is set forth at pages 4 through 8 of the Jurisdictional Statement. The Jurisdictional Statement also sets forth the questions presented and the bases upon which appellant maintains that the questions are substantial.

This brief will be limited to answering points raised by appellees' motions.

ARGUMENT

The Westinghouse appeal presents three substantial questions. One of those, the question whether the District Court abused its discretion by holding that opposition by the Department of Justice required it to refuse to exercise its discretion to permit intervention by Westinghouse, is of great significance. An affirmance (or dismissal) by this Court will mean that the Department of Justice can always control the discretion of the District Court.

(a) Question of whether Government's opposition should have controlled the Court

Appellees contend that the District Court's denial of intervention was not based "'merely' on grounds that 'since plaintiff opposed intervention * * * the Court would not as a matter of law exercise its discretion to permit intervention'" (U. S. 9), and that "The court below did not decline to exercise its discretion 'as a matter of law'" (RCA 12).* Those contentions are contrary to the plain language of the opinion that the District Court's denial of permissive intervention was based solely on the ground that intervention should not be allowed "over the objection of the authorized agency".

---

*RCA and NBC also maintain, at pages 12-3 of their Brief, that Westinghouse cannot even invoke Rule 24(b). But, in *Allen Calculators, Inc.* v. *National Cash Register Co.*, 322 U. S. 137, 141, this Court, in a similar situation, held

> "The appellant had standing to invoke the discretion of the District Judge to permit it to intervene under [Rule 24] (b)(2) on the ground that its 'claim or defense and the main action have a question of law or fact in common'".

The District Court denied intervention on two grounds:

(1) That "this Court has no jurisdiction to allow the intervention sought" in view of the provision of the Judgment that jurisdiction was retained for the purpose of enabling the parties thereto, "and no one else", to apply to the Court.

(2) That intervention should not be allowed over the objection of the Department of Justice because

> "It would not lead to an orderly administration of justice to allow intervention in this type of anti-trust litigation over the objection of the authorized agency of the United States in charge of enforcing a decree which it has obtained."

The clear question presented by the Westinghouse appeal, in so far as it concerns permissive intervention, is whether, as a matter of law, a District Court should refuse to permit a third party to intervene in an attempt to demonstrate to the Court that its judgment is being violated solely because of "the objection of the authorized agency of the United States in charge of enforcing a decree which it has obtained."

It is undoubtedly proper that in some circumstances intervention should be denied where the Department of Justice has objected. It is clear, however, that there are other circumstances, such as those obtaining here, where intervention should be permitted in aid of the effective enforcement of the antitrust laws. But, if this Court affirms the decision of the District Court or dismisses the appeal of Westinghouse, it would be announcing for the first time a general rule of law that under no circumstances should a third party be allowed to intervene over the objection of the Department of Justice.

Situations in which intervention may be properly denied on the basis of the Department's objection are illustrated

by the cases cited by appellees, none of which is applicable to the case at bar. The Department may rightly object to private individuals attempting to intervene to have a voice in framing a judgment or to modify a judgment previously entered, and, in such cases, its objection might properly be controlling.* Similarly, where the Department has presented the available facts as to enforcement of a judgment to the court, it may object on the basis of orderly procedure to a third party doing the same thing.** But where a third party is seeking an opportunity to persuade a court to enforce a judgment entered into by the United States to protect the public interest and the private interest of persons in the position of the intervenor, the court should hear the intervenor in order to determine if its judgment is being enforced, *cf. System Federation No. 91* v. *Reid*, 180 F. 2d 991, 998 (6th Cir. 1950), and this Court indicated in *Allen Calculators, Inc.* v. *National Cash Register Co.*, 322 U. S. 137, that it would be an abuse of discretion not to allow intervention where the Government does not present facts to the court.

This is a case in which the Department's position should not have controlled and intervention should have been permitted. At the very least, the Court should have exercised its discretion (as the Government suggested) to determine whether Westinghouse's theories warranted intervention. Westinghouse, as an independent station owner, was a person whom the decree was designed to protect. In fact, it was the deal that deprived Westinghouse of its

*See *United States* v. *Bearing Distributors Co.*, 18 F. R. D. 228, 231 (W. D. Mo. 1955); *United States* v. *General Electric Co.*, 95 F. Supp. 165 (D. N. J. 1950); *United States* v. *Bendix Home Appliances, Inc.*, 10 F. R. D. 73 (S. D. N. Y. 1949); *United States* v. *American Society of Composers, Authors and Publishers*, 11 F. R. D. 511 (S. D. N. Y. 1951).

**See *Allen Calculators, Inc.* v. *National Cash Register Co.*, 322 U. S. 137; *Wometco Television & Theatre Co.* v. *United States*, 355 U. S. 40; *United States* v. *Loew's Inc.*, 136 F. Supp. 13 (S. D. N. Y. 1955).

Philadelphia station that caused the Department to bring the action.

The Department of Justice, in opposing intervention (R. 43-4), did not suggest that intervention would obstruct the orderly administration of justice. Indeed, it suggested that "the court might find it helpful, [in] considering whether its judgment has been transgressed, to hear the views of the would-be intervenors." (R. 44) Contrary to RCA's contention (RCA 12), no facts were presented to the Court by appellees. The only "fact" to which RCA refers as having been presented to the Court is a copy of a letter dated May 26, 1960, from the Acting Assistant Attorney General, Antitrust Division, to Representative Celler (Appendix A to RCA motion). But that letter is a statement of conclusions, not evidence of facts. Furthermore, the soundness of those conclusions is open to serious doubt. For example, Mr. Bicks stated that the Antitrust Division had given "extensive consideration to the possibility that the instant transactions constituted the final stage of the RCA-NBC conspiracy alleged in the complaint." (RCA 20) He went on to state that

> "In light of the presumption that the conspiracy had ended with the entry of the Final Judgment, we thought it highly unlikely that the court would find this initial conspiracy between NBC and RCA to have been resurrected or to have survived, solely on the ground that one end sought by the conspirators had been achieved with the acquisition by NBC of stations in Boston and San Francisco."

There is no indication, apart from that unsupported statement of a presumption, why the Department of Justice concluded that it was "highly unlikely" that the District Court would find that the conspiracy continued. The Department of Justice concedes that consummation of the proposed transactions will result in RCA's and NBC's

achieving the very result which the Department of Justice alleged was unlawful. Someone should be allowed to present the facts to the Court. It is not enough for the Department to believe it "unlikely" that the Court will find its judgment violated.

(b) Question of whether Court had jurisdiction to permit intervention

Even the Department of Justice has considerable difficulty in supporting the main basis for Judge Kirkpatrick's decision, *i.e.*, that the court no longer had jurisdiction to permit intervention pursuant to the Federal Rules of Civil Procedure. The Department's position on that question is limited to a footnote on page 8 of its Brief wherein its support is limited to the following statement: "We know of no court decision in conflict with this [the lower court's] view." Indeed, that basis of the Court's decision is directly contrary to the position taken by the Department before Judge Kirkpatrick on May 6, 1960, and in its memorandum in opposition to Westinghouse's motion. (R. 43-4) After reciting the provisions of Section VIII of the Judgment, the Department stated to the Court on May 6:

> ". . . jurisdiction has not been exhausted and . . . the government not only would not oppose hearing anyone who wishes to be heard on this subject, but would urge you to exercise your discretion, to hear them if there should be any." (R. 39)

In its Memorandum dated June 3, 1960, the Department assumed the District Court retained jurisdiction and urged the court to hear Westinghouse for the limited purpose of determining "whether their proffer of proof and theories" warranted a determination under the Judgment.

The inclusion of the "and no one else" language in the Final Judgment was not intended to strip the District Court

of its jurisdiction; it was not intended to restrict the right of persons to intervene under Rule 24(a) or the power of the Court to permit intervention as a matter of discretion under Rule 24(b). Its purpose was to make clear that no third party was given an additional right to intervene under the terms of the Final Judgment such as was involved in *Missouri-Kansas Pipeline Co.* v. *United States*, 312 U. S. 502.

(c) Question of Westinghouse's right to intervene under Rule 24(a)(3)

Finally, on the question of Westinghouse's right to intervene under Rule 24(a)(3) it is difficult to understand how appellees can now allege that Westinghouse will not be adversely affected by the proposed disposition of the Philadelphia station in light of the certain termination that will result of Westinghouse's NBC affiliation in Boston. Westinghouse's motion for leave to intervene alleged that irreparable damage would result from loss of NBC affiliation (R. 27-8), and appellees did not controvert that pleading. The Department has conceded that "loss of NBC affiliation by Westinghouse . . . may result in economic injury to . . . [its] broadcasting operations in Boston" (RCA 20). The Department's action against NBC and RCA was predicated upon the importance of NBC affiliation to independent station owners such as Westinghouse and the use of the power to deprive such a station owner of that affiliation as a means of carrying out the illegal conspiracy. The Final Judgment enjoined the use of the power to terminate NBC network affiliation to coerce independent station owners to transfer an ownership interest in a broadcasting station.

Since the proposed disposal of the Philadelphia station will clearly adversely affect Westinghouse and since the

disposition of that station is subject to the control of the court, *Sutphen Estates, Inc.* v. *United States*, 342 U. S. 19, 22, intervention as of right under Rule 24(a)(3) was available to Westinghouse.

CONCLUSION

For the reasons stated above, the motions to dismiss or affirm should be denied and either probable jurisdiction should be noted or the question of jurisdiction should be postponed until a full hearing and determination of the merits.

Respectfully submitted,

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